WESTERN SLOPE CARBON, INC.

IBLA 72-4 Decided April 14, 1972

Appeal from decision (D 056724) of Colorado state office, Bureau of Land Management, denying request for modification of coal lease.

Affirmed.

Coal Leases and Permits: Leases

An application to modify a coal lease to include contiguous coal deposits will be denied if it is determined that the additional lands requested can be developed as part of an independent operation or there is a competitive interest in them.

Coal Leases and Permits: Leases

Despite a disclaimer by one coal producing company that it does not intend to bid on a coal lease, there is a competitive interest in the land and deposits if that company enters into an agreement with another coal producing company to sublease several of the coal seams in the land which the latter company seeks to have added to an existing coal lease by modification of its lease.

APPEARANCES: Edward J. McDonough for appellant.

OPINION BY MR. RITVO

This is an appeal by Western Slope Carbon, Inc., from a decision by the Colorado state office, Bureau of Land Management, dated May 19, 1971, which denied its request for modification of coal lease Denver 056724. Western Slope asked to modify its lease to include lots 16 and 17 of section 2 and lots 13 and 18 of section 3, T. 13 S., R. 90 W., 6th P.M. It later amended this application to include lots 14 and 17 of section 3, T. 13 S., R. 90 W., 6th P.M. The land office denied the request, stating that it had been determined there was a possible competitive interest in the lands. It denied the application without prejudice to the applicant's right to file for a competitive lease.

Lease Denver 056724 covers 189.24 acres in secs. 10 and 11, T. 13 S., R. 90 W., 6th P.M., Colorado. The land described in the request for modification, as amended, abuts the leased lands to the

north with a portion extending to the west. Western Slope is the sublessee of lease Denver 042921 which adjoins both lease Denver 056724 and the area sought in the modification to the east. United States Steel Corporation controls fee land to the west and adjacent to both lease Denver 056724 and the land described in the request for modification.

According to the case record, Denver 056724 contains five coal seams, which extend into the lands that adjoint it. These seams are referred to in descending order as E, D, C, B, and A.

United States Steel, as a sublessee of Denver 056724, has the right to mine the lower three seams, that is, seams A, B, and C. Seams A, B, and C are mineable from the fee lands. Western Slope retains the right to mine the upper two seams, D and E.

The applicant is now mining the E seam. It says that it will exhaust the E seam in two or three years and that its natural projection for development is into the land applied for.

On October 26, 1970, United States Steel, in response to an inquiry from the Geological Survey's regional mining supervisor, Denver, advised that "United States Steel Corp. is definitely interested in bidding * * *" on a lease for the land sought in the application for modification.

On February 21, 1971, Western Slope and United States Steel entered into a Supplement No. 1 to the coal mining sublease of Denver 056724. The Supplement expanded United States Steel's mining rights into the land included in the application for modification. Thereafter, United States Steel stated that it had no interest in bidding for the land.

The appellant contends that only it and its sublessee, United States Steel, have access to or can mine the additional land requested in an economical manner. Therefore, it contends there is no competitive interest for the additional land. It also contends that it needs to develop this land for the best mining and conservation practices and that its present plans will be disrupted if the additional acreage is not obtained. Finally, it argues it would be in the best interest of the United States to permit development of this land by Western Slope.

The regulations, found at 43 CFR 3524.2-1, are specific as to when a lessee may obtain modification of his coal lease:

> (2) Availability - (i) Noncompetitive. Upon determination by the authorized officer that the modification is justified and that the interest of the United States is protected, the lease will be modified without

> competitive bidding to include such part of the land or deposits as he shall prescribe.
>
> (ii) Competitive. If however, it is determined that the additional lands or deposits can be developed as part of an independent operation or that there is a competitive interest in them, they will be offered as provided in subpart 3520.
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> Subpart 3520 provides for competitive bidding.

In a memorandum dated January 20, 1972, from the Director, Geological Survey, to this Board, it is agreed that no independent developer would be justified in mining this limited acreage, containing only 241.1 acres. It notes, however, that both the applicant and United States Steel have access to the requested land and could mine it economically.

The Geological Survey also agreed that in the interest of conservation the upper seams should be developed and mined prior to the lower seams. It also recognizes that Western Slope will have to modify its present mining plan extensively in order to develop the coal resources on an adjacent federal leasehold if it does not acquire the requested land. However, it concludes that its recommendation is based solely on the requirements of the regulation that the lands be offered competitively if it is determined there is a competitive interest.

Despite United States Steel's disclaimer of interest, the Geological Survey states that the two companies are interested in two separate coal horizons and that the Department would normally issue only one lease for all the coal beds within the lands. It concludes there is a competitive interest in the "modification" land.

Since it is plain that United States Steel at one time had a competitive interest in leasing the lands applied for, the issue becomes whether its later disclaimer of interest is to be accepted at face value. If there were no more to the case than this, there might be no reason to dispute its statement, for an expression of interest is not an irrevocable act. Here, however, United States Steel has entered into an agreement with Western Slope to sublease the same coal seams in the "modification" lands as it has under sublease Denver 056274. Thus, it apparently has an interest in controlling the exploitation of some of the coal in the lands applied for. Whether its interest is sufficient to lead it to bid for the lands (and in turn sublease the upper seams to Western Slope) cannot be forecast with certainty now. Nonetheless, there are two companies expressing an interest in acquiring the rights to mine coal in the "modification" lands, albeit not the same coal seams. That one says it does not desire to bid for a lease, after it has agreed to accept a sublease from the other, does not eradicate the conflicting attempt

to obtain the same goal--a struggle which is the essence of competition. Saskatchewan Minerals v. United States, 253 F. Supp. 504, 507 (D.C. Wash. 1965), vacated and remanded, 385 U.S. 94 (1966). 1/

The concurring opinion finds that there is no competitive interest because United States Steel is not striving for the same goal as appellant, that is, the obtaining of a coal lease from the United States. This conclusion ignores the regulation. The regulation requires competitive bidding if there is a competitive interest in the additional lands or deposits. United States Steel plainly has an interest in obtaining some of the coal deposits that appellant wants. That conflict or rivalry is sufficient to require competitive bidding. The concurring opinion would limit competitive interest to rival bidding for a coal lease. Bidding for a lease is not the only method of manifesting a competitive interest in coal deposits or lands. A lease is only one legal mechanism by which a coal producer can get rights to coal deposits or lands. It by itself is not the end-all or be-all of the contention between rival producers. The coal deposits or the lands are the substance and the reality of what a coal producer wants. Here it is patent that both companies desire deposits in the same land. To state otherwise is to close one's mind to the existential facts and to permit a veil of verbiage to camouflage the naked economic truth.

The United States Steel has attempted to reach its goal by a sublease, which is valid only if the modification is granted, only reaffirms its desire to acquire the same goal as appellant seeks.

Accordingly, we find that there is a competitive interest in the lands and coal deposits and that, in accordance with the regulation, they must be offered for competitive bidding.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision of the Colorado state office is affirmed.

Martin Ritvo, Member

We concur:

Joan B. Thompson, Member

Frederick Fishman, Member (concurring specially)

1/ "Competition is defined as `the independent endeavor of two or more persons to obtain the business patronage of a third by offering more advantageous terms as an inducement to secure trade.'" Id. at 507.

Frederick Fishman, concurring.

I agree with the conclusion reached in the main opinion that the application for modification should be denied, but not based upon the rationale employed.

The essential facts follow. On October 26, 1970, United States Steel stated that it "* * * is definitely interested in bidding. * * *" [Emphasis supplied]. On February 21, 1971, Western Slope and United States Steel entered in a modification of a sublease, expanding the latter's mining rights to include the land embraced in Western Slope's application for modification. Thereafter, United States Steel stated it had no interest in bidding for the land.

Under 43 CFR 3524.2-1(2)(ii) an application for modification of an existing lease will be denied and the land offered competitively "[if] * * * it is determined that the additional lands or deposits can be developed as part of an independent operation or that there is a competitive interest in them. * * *"

Concededly, the lands cannot be developed as part of an independent operation. This brings to the fore whether there is a "competitive interest" in the coal deposits.

The main opinion recites that the fact that "it [United States Steel] has agreed to accept a sublease from the other [Western Slope], does not eradicate the conflicting attempt to obtain the same goal -- a struggle which is the essence of competition."

There are two elements to be considered--"competitive" and "interest."

Competition has been defined as "* * * the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time; common strife for the same object; strife for superiority * * *." Simmons v. Johnson et al., 11 So. 2d. 710, 712 (La. 1942). See also State v. Port Royal La. Ry., 45 S.C. 413, 23 SE 363, 369 (1895).

Unquestionably, United States Steel has an "interest" in developing some of the coal deposits in the lands in issue. But it is not striving for the same goal, i.e. the obtaining of a coal lease from the United States. It has specifically stated that it does not desire to bid for a lease offered at competitive bidding. It manifests no rivalry to obtain such a lease from the United States. To state that there is a "competitive interest" is in essence to shut one's mind to the facts of record.

The main opinion properly recognizes that United States Steel "plainly has an interest in obtaining some of the coal deposits that appellant wants." Whence comes the competition or rivalry? There

is none, 1/ for appellant has already subleased to United States Steel the deposits the latter desires. Insofar as the United States is concerned, what relevance does the term "competitive interest" have if it is not equated with competitive bidding? If it is not so equated the use of the term is an academic exercise.

Apart from the cited regulation, there is, in my judgment, a cogent reason why the application for modification should not be approved.

The sublease entered into between the parties, covering the lands in the application for modification is contrary to the spirit of 18 U.S.C. § 1860 (1970), which interdicts agreements or any devices designed to discourage bidding upon public lands. I do not mean to suggest that a criminal violation has occurred or that the parties acted with mens rea. However, it is clear that the sublease agreement, embodying the lands in issue, despite any bona fides of the parties, necessarily tends to suppress bidding.

An agreement which tends to discourage competition in seeking a public contract is a sufficient basis for invalidating a contract awarded to one of the participating parties. See Morgan v. Grove, 206 Cal. 627, 275 P. 415, 417 (1929); cf. McMullen v. Hoffman, 174 U.S. 639 (1899).

1/ This view is buttressed by VI BLM 2.16.17, relating to Lake Mead Recreation Area mineral leasing, which states:

"A. Where the State Supervisor [now State Director] determines that a competitive interest exists in any particular tract of land a lease covering such land may, in his discretion, be offered by competitive idding. * * *

"(1) Where more than one application for lease is filed for the same land, it is presumed that a competitive interest exists therefor."

See also 43 CFR 3611.1 (1972), pertaining to noncompetitive (negotiated) sales of mineral materials. This section reads as follows:

"§ 3611.1 Limitations in value.

"When it is determined by the authorized officer to be in the public interest and where the sale is of property for which it is impracticable to obtain competition, he may sell at not less than the appraised value, without advertising or calling for bids, mineral materials not exceeding $5,000 in value. Where it is impracticable to obtain competition and the materials are to be used in connection with the development of Federal lands under a mineral lease or leases issued by the United States, sales under this paragraph may be made in a sum not exceeding $10,000." [Emphasis supplied.]

This section evinces the interest in the regulations to equate competition with interest in bidding competitively for a resource.

The same considerations of public policy dictate that a party, seeking to be awarded a lease modification on the basis of no competitive interest, should be refused where his conduct has had the result of tending to suppress competition by the only other potential bidder. Such refusal would accord with the Department's authority under the Mineral Leasing Act, as amended, 30 U.S.C. §§ 181-287 (1970). See Udall v. Tallman, 380 U.S. 1 (1964); Duesing v. Udall, 350 F.2d 748 (1965), cert. denied 383 U.S. 912 (1965).

43 CFR § 3524.2-1(a)(2) (1972) provides:

> (2) Availability--(i) Noncompetitive. Upon determination by the authorized officer that the modification is justified and that the interest of the United States is protected, the lease will be modified without competitive bidding to include such part of the land or deposits as he shall prescribe.
>
> (ii) Competitive. If however, it is determined that the additional lands or deposits can be developed as part of an independent operation or that there is a competitive interest in them, they will be offered as provided in subpart 3520. [Emphasis supplied].

A finding in the case at bar that the underlined criteria preclude the modification would seem to be fully justified.

If this conclusion be accepted, the question is raised as to what action should be taken to lease the coal deposits.

This further raises the question whether 43 CFR 3524.2-1(a)(2)(ii) precludes a competitive sale, absent a finding that the "* * * deposits can be developed as part of an independent operation or that there is a competitive interest in them * * *."

To construe that subsection as setting the only situations in which competitive bidding may transpire would, as in the instant case, create a hiatus. This conclusion is impelled by the recognition that if neither of the criteria of (i) or (ii) is fully satisfied, and the existence and workability of the coal deposits is known (see 30 U.S.C. § 201(b) (1970)) there would be no method of disposing of the coal. Such a construction runs counter to the broad authority vested in the "* * * Secretary of the Interior * * * to divide any of the coal lands or the deposits of coal, classified and unclassified * * * [and to] offer such lands or deposits of coal for leasing * * *." 30 U.S.C. 201(a) (1970). See 43 CFR § 3521.2 (1972).

For the foregoing reasons I concur in the conclusion reached in the main opinion that the application for modification be denied and the land offered at competitive bidding, recognizing the distinct possibility that there may be no competition in the bidding.

Frederick Fishman, Member